UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION
CASE NO. 16-CV-80655-ROSENBERG

JAMES TRACY,

Plaintiff,

vs.

FLORIDA ATLANTIC UNIVERSITY BOARD OF TRUSTEES,

Defendant.

West Palm Beach, Florida

December 8, 2017

VOLUME 8

JURY TRIAL PROCEEDINGS
BEFORE THE HONORABLE ROBIN L. ROSENBERG
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

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THE COURT: Good morning. You may be seated.

Can I get the status of the case before the jury comes in?

MR. CURLEY: We decided we are done and we will rest our case.

THE COURT: We will do that when the jury comes in at 9:00. What about rebuttal?

MR. LEO: No rebuttal.

THE COURT: I will tell the jury that they will get a free day today.

We are not ready to get it to the jury today. We have some work to do still on final rulings on the motions, motion, and also the jury instructions.

I thought we would take between now and 9:00 to cover ground on the jury instructions and maybe after the jury leaves, if we haven't finished it, we will finish it, and if you have supplemental arguments to make, you can supplement your motion. There is no evidence, but if there is anything supplemental you want to add, I will hear that, and the Court should be in a position to --

MR. BLICKENSDERFER: You will allow Plaintiff to make a motion as well?

THE COURT: Sure. What I handed out we will mark Court Exhibit 3 and Court Exhibit 4, so everyone will be assured these will be part of the overall record. Obviously

court exhibits don't always go back to the jury.

Court Exhibit 3 is a redlined version and Court Exhibit 4 is a clean version.

In the interest of completeness, we will go through it.

I have made some changes, some of which incorporate what came up yesterday. I adopted some of the arguments that were made by one or other party, and in other instances I didn't, and I can explain why on the record.

I will say this just from the outset so everybody knows, there was a pervasive objection made by Defense throughout the document, and I will address it right now, what the Court's ruling is and why.

Defendant had asked that the Court deviate from the 4.1 pattern instruction by adding the word "substantial".

The pattern instruction uses the word motivating. The Defendant requested the Court use the phrase substantial motivating factor. The Court declines to deviate from the pattern as requested by the Plaintiff for these reasons:

First, the parties explain why substantial should not be used. Annotations to the pattern acknowledge case law that uses substantial, but the pattern uses motivating to eliminate confusion from using the word substantial and motivating.

Secondly, substantial and motivating can be confusing because of a double modifier in different parts of the jury

instruction can lead to confusion. The Court does not want to deviate from the pattern. That is the ruling that will apply each and every time the Defendant had requested the Court to make that change.

Cover page, Plaintiff.

MR. BLICKENSDERFER: No objection.

MR. CURLEY: Your Honor, taking into consideration the Court's ruling, I want the record to reflect that we object to the Court's ruling, and we reserve our objection for purposes of appeal.

THE COURT: Yes. Again, any time the Court has made its ruling on subsequent issues, you can restate your objection as well to that or other issues. You have a ruling on substantial.

Is the cover page acceptable?

MR. BLICKENSDERFER: Yes.

THE COURT: Court's -- to the Defendant.

MS. HUFF: Yes, your Honor.

THE COURT: Court's instruction to the jury.

MR. BLICKENSDERFER: No objection.

MS. HUFF: No objection.

THE COURT: Duty to follow instructions.

MR. BLICKENSDERFER: No objection.

MS. HUFF: No objection.

THE COURT: Consideration of direct and circumstantial

evidence.

MR. BLICKENSDERFER: No objection.

MS. HUFF: No objection.

THE COURT: Credibility of witnesses.

MR. BLICKENSDERFER: No objection.

THE COURT: No objection?

MS. HUFF: No objection.

THE COURT: Expert -- there we go, that comes out now. Do we all agree that comes out?

MR. BLICKENSDERFER: Yes, your Honor.

THE COURT: That is why we go over these things several times just to make sure. That comes out. Okay.

So, here we go, next page, responsibility for proof, Plaintiff's claims, preponderance of the evidence. So, what you can see here is that -- actually, I don't know that there was any issue here.

Take a look at this one and see if this is okay.

MR. BLICKENSDERFER: Your Honor, there is no change from last night's red line discussions to today.

THE COURT: That is right, there is not. It is still showing the red line because I think it was from the original version, but I kept it because no one objected. I am double checking. That is acceptable to the Plaintiff?

MR. BLICKENSDERFER: Yes.

THE COURT: Defense?

MS. HUFF: Yes, your Honor.

THE COURT: The next page I made changes, and I want you to know I took the Defendant's second affirmative defense and added it to the first affirmative defense. It appears to be the same thing, I did not see any harm in putting them together.

The Court doesn't fully understand the distinction between one and two, which is why it initially eliminated two altogether.

As to number three, I would need -- if you are persisting, Defense, on number three, I need you to show me where in the affirmative defenses you are getting that.

Why don't you take a look at what I have done now in the context of everything, you know, we discussed and see if you think that is acceptable. I will ask Defense first and than go to the Plaintiff.

MS. HUFF: Yes, your Honor, in the complaint I think we had an affirmative defense for contributory negligence or comparative negligence. Under Rule of Civil Procedure 8(c), an affirmative defense must be stated and was stated in the second amended complaint and that is how this is stated here, that he contributed -- his actions contributed to his termination.

THE COURT: Which are you talking about now, number two or number three?

MS. HUFF: Number three.

THE COURT: That is where it says, FAU claims Tracy's claims are barred or limited to the extent that his termination resulted from his own actions.

What page -- I would need to see -- I would assume I would need to see you show me in Docket Entry 329, which is the affirmative answer and second amended complaint, which affirmative defense that is.

MR. BLICKENSDERFER: Docket Entry 329, page 75, paragraph eight.

THE COURT: Let me take a look at that.

Page 75, paragraph eight, Plaintiff's claims are barred or limited to the extent that Plaintiff's damages resulted from his own actions.

Okay, now we found it. Tell me what you said about the legal authority. What were you saying as far as contributory negligence?

MS. HUFF: To the extent Plaintiff tried to strike many of the affirmative defenses several times, to the extent they are arguing it is not a true affirmative defense, it is to that defense that the Plaintiff contributed to his own harm, that is listed under -- the Plaintiff actually contributed to his own harm, we pled it in the second amended complaint, and we would like it here in the jury instructions.

THE COURT: Wouldn't we need a question on the verdict form to match up with it?

The first one talks about FAU discharged Tracy for retaliatory reasons. That matches up with the second verdict form, I think what is now our second verdict question, verdict form question, which is that FAU would have discharged Tracy from his employment even if FAU had not taken Tracy's blog speech into account. That is what the whole case is about.

How were they going to reconcile that affirmative defense in a jury instruction when it is not on the verdict form?

MR. CURLEY: It can be on the verdict form, and that is a good point. We presented a substantial amount of evidence to show that he in fact caused his own termination. He didn't do things that would have prevented his termination, and Dean Coltman testified he wanted to be fired, it seemed like he provoked it. That is exactly the point here.

As your Honor knows, we believe he is doing it for the purpose of writing, whether it is a blog or book, whatever it might be. Yes, he did, he fired himself, that is pretty much it.

THE COURT: So, number one, it wasn't an affirmative defense, number two, it was not -- can we hold on one second.

MR. BLICKENSDERFER: There were multiple motions to strike the affirmative defenses, and they were overruled.

THE COURT: So, the affirmative defense stands.

MR. BLICKENSDERFER: Right, over our objection, your

Honor.

THE COURT: Okay.

MR. BLICKENSDERFER: If I may respond. First of all, defendant acknowledges this is not a tort action, this is a First Amendment retaliation action. There is a pattern for that.

What they are asking for is essentially -- that question on the verdict form that says what they have done, what they did in the absence of his speech, if he caused that termination, that is where it is resolved. There is no additional question did he contribute for his own firing on the basis of his speech. If they found that the speech was a factor, that would kind of up end First Amendment retaliation claims. It makes no sense.

As it is plead in the amended complaint, it seems to go more towards damages, in fact eight states damages, and so I don't think that this is a defense that can preclude his claim if they find that he contributed.

I need to see a case that supports this position, and second of all, we need to go into what contributed means in retaliation First Amendment. I don't know if that exists.

THE COURT: Do you have any case law in a First Amendment case for this defense and how it would be -- how it presents itself?

MR. CURLEY: It is a waiver. When you intentionally

engage in misconduct, you intended to provoke this action, that is a waiver. That is an intentional effort to interfere with your rights, and that is what happened here. We put on evidence of that.

I don't care if it is a question on the verdict form or not, but it is a theory of our defense and we are entitled to have the jury instructed on that. It is in the affirmative defenses, and we plead it, and we are entitled to that.

THE COURT: Your position is you want it in the jury instructions and you are indifferent whether it goes into the verdict form.

MR. CURLEY: I am.

THE COURT: Let me take a look at that. I will keep that noted right there.

Okay, anything else on that page?

Is the way the Court combined one and two acceptable to the defendant?

MR. BLICKENSDERFER: Your Honor, before we move on --

THE COURT: I will let Plaintiff respond, but for Defense, anything further on this page for the Defense?

MS. HUFF: No, your Honor, we accept the stricken two to be combined with one. We are trying to make stricken number three our number two.

MR. BLICKENSDERFER: We object to that for the reasons stated previously, and I want to correct the record to reflect

that the affirmative defenses, our objections were not overruled. The Court ruled what we did not agree to or what we challenged were treated as denials.

THE COURT: What Docket Entry was that?

MR. BLICKENSDERFER: I don't have it.

MR. LEO: We are looking for it.

THE COURT: We will be able to find it. If you find it, let me know.

MR. LEO: Thank you, your Honor.

MR. BLICKENSDERFER: 121, affirmative defense is not an affirmative defense, it would be treated as a denial. 121.

THE COURT: Let me take a closer look at that one.

Then the next page. Otherwise we are okay on both sides, other than the objection you made?

MR. BLICKENSDERFER: Yes, we actually like it without two or three. We are okay with the change, your Honor.

THE COURT: You are okay with the change with number two moving into number one, you hold to the position you don't want number three.

MR. BLICKENSDERFER: Correct.

THE COURT: Defense is okay with this except you want number three.

MS. HUFF: We would like number three to be number two.

THE COURT: Duty to deliberate when both Plaintiff and

Defendant claim damages. From the Plaintiff.

MR. BLICKENSDERFER: No objection.

MS. HUFF: No objection.

THE COURT: Next page, public employee, First Amendment claim. Even though through its officials while acting under color of law is part of the pattern, I did remove it because it is not a contested issue and we took this up yesterday. I thought maybe, in light of the conversation yesterday, everyone would agree to that. And then let me go on and explain what else was done.

I did adopt what the Defense was raising yesterday about being more specific about speech, and so you can see that it says -- what I did was I defined Defendant's speech as blog speech, because it seemed to be a fair summary of the speech. FAU didn't know about his book, and I don't really think Plaintiff is arguing that his podcasts were the cause. It seems the essence of Plaintiff's case has always been the blog, and so, what I did was, any time in the pattern where the pattern has brackets that says described speech, I used blog speech.

And then otherwise, I know that there were parts of the pattern -- we will get to that in the next page. It talked about protected speech, because the effect of protected speech is no longer a -- it is either called blog speech any time the pattern called for a bracket to insert a description of the

speech and when the pattern didn't call for that, I used the word speech.

That is what the Court did in the first paragraph including taking out officials working under color of law, because that is no longer a contested issue. And I think those are the primary changes.

Why don't you look at it, and I will hear from Plaintiff first, and then Defense as to that one page. We will take it a page at a time.

MR. BLICKENSDERFER: If I may, your Honor.

THE COURT: Yes.

MR. BLICKENSDERFER: We would maintain, depending on what the Defendant would like to do as far as having a special instruction on the deal-makers mentality, I don't know what you call it, if they insist on that, we'll insist, even though it is not contested on the under color language, if that does not come in, we are okay with it coming out.

THE COURT: We will talk about that special in a moment.

I will make a note if special, Plaintiff wants in; if no special on decision maker, Plaintiff wants out.

MR. BLICKENSDERFER: Yes.

THE COURT: Okay, what else? Any other issues on that page?

MR. BLICKENSDERFER: We prefer the original language

describing the speech. We would prefer to keep the language we discussed last night.

THE COURT: Would you say calling Professor Tracy's speech blog speech accurately describes the speech in this lawsuit?

MR. BLICKENSDERFER: For the most part, yes. I have a whole argument about what his speech entailed that we were going to get into later, and it is consistent with his online speech, including speech online, his speech on the blog, including blog speech.

THE COURT: What about Professor Tracy's online blog speech?

MR. BLICKENSDERFER: We prefer to the online speech.

THE COURT: All of the online was through his blog.

MR. BLICKENSDERFER: No, social media and podcasting, we appreciate the Court's thinking we are not talking about the substance of his podcasting, but his blog.

THE COURT: Online blog.

MR. BLICKENSDERFER: Right, but it entailed social media as well.

MS. HUFF: Social media is not in evidence.

MR. BLICKENSDERFER: The statement by Professor Morton referenced Twitter, including blog, Morton's statement to the price, and Coltman we argued adopted, references his blog, it is not just limited to his blog. We understand the Court's

position on this, we would like to maintain --

THE COURT: It shouldn't be a debatable issue. I think there is language that both sides should agree to that would encompass the essence of the case.

MR. BLICKENSDERFER: To say online blog speech is redundant. It should be blog speech or online speech.

MS. HUFF: Your Honor, you are saying that we should know what the speech is. This is so difficult to come up with jury instructions because we don't know what Plaintiff's speech allegedly caused his termination.

THE COURT: The way the Court has written this is what you --

MS. HUFF: We want to base our objections on the -- we don't know what he was desiring to do and it's necessary to send causation to the jury.

THE COURT: I understand that is your argument in your motion. For purposes of the jury instructions, is there anything objectionable about the first paragraph as written?

MS. HUFF: As a default mechanism in this scenario when we don't have a ruling on the J motion, blog speech, which limits it to the Plaintiff's blog, that is all we have in evidence.

THE COURT: And while acting under color of state law, you wanted that out.

MS. HUFF: Yes, it is not contested.

THE COURT: Second paragraph, any objection from Plaintiff?

MR. BLICKENSDERFER: For clarification purposes, is this when we start talking about protected, and eliminating that? I don't see where the word protected --

THE COURT: You will keep going, still on the presumption, hypothetical scenario where the ruling has been in the Plaintiff's favor, and taking into account everything we talked about yesterday.

Again, all the Court did is it -- when it called for a descriptive in the pattern about the speech, it called it blog speech. It did take out the word protected because it was never defined, because there is an agreement that section that spoke about protected speech, both sides wanted it out.

If you take it page by page, you can understand and maybe it will make more sense.

MR. BLICKENSDERFER: I understand, your Honor. My standing objection to blog speech for the time being remains. Other than that, no objection to the rest of the paragraph.

THE COURT: And from the Defense.

MS. HUFF: Yes, your Honor, there are two places in the second full paragraph where the conflict of interest policy is referenced in the collective bargaining agreement. The conflict of interest policy in evidence is in the Collective Bargaining Agreement, it is not merely referenced. This is an

argument they made on summary judgment, that the conflict of interest is in many places, they are rehashing that. They are trying to expand the conflict of interest policy for the purpose of raising the five counts dismissed from the case.

THE COURT: This is a new argument, this wasn't made yesterday. You are raising this for the first time today.

MS. HUFF: Yes, we would like it to read conflict of interest policy in the Collective Bargaining Agreement, take out reference.

MR. BLICKENSDERFER: This objection was not made yesterday. We agree this most accurately reflects the testimony from everybody, that the policy is referenced in the CBA and comes from other sources. To say it is a policy in the CBA would be misleading.

THE COURT: Okay. Anything else from the Defense?

MS. HUFF: We would like to note it is in two places in that paragraph.

THE COURT: Yes.

MS. HUFF: We would like reference removed from both of those. Besides that point, we are fine with everything in the second paragraph.

THE COURT: Again, the Plaintiff's position is?

MR. BLICKENSDERFER: The same, your Honor.

THE COURT: The conflict of interest policy is in the CBA, correct?

MR. BLICKENSDERFER: It is incorporated in the CBA, applies to all employees.

THE COURT: But that is where one finds it, in the CBA?

MR. BLICKENSDERFER: One could find it there, the form is not there. The policy encompasses the form, guidelines, those things are not in the CBA. The CBA doesn't cross reference the guidelines in the form. You have to know what the policy consists of. To say the policy is in the CBA, that is misleading, the policy is much bigger than that.

THE COURT: I will take a closer look at that.

The next page. One thing you will see was added, again, based on the ruling the Court hasn't made yet, just to provide the framework for a working draft, I added the sentence "the Court has already found that Professor Tracy's blog speech was a matter of concern." As soon as the Court makes that finding, that is one change, and the rest of the changes were all agreed to.

So it reads, to succeed on his claim Professor Tracy must prove the following by a preponderance of evidence: Professor Tracy's blog speech was a motivating factor in FAU's decision to discharge Professor Tracy.

From the Plaintiff.

MR. BLICKENSDERFER: We are okay if the Court ends up ruling that way. We think it could be simpler by saying that

his blog speech was constitutionally protected. That ruling will encompass our position.

THE COURT: The analysis the Court is making is a determination whether it was a public concern.

MR. BLICKENSDERFER: If that is the analysis, we are fine with this.

THE COURT: Okay. From the Defense.

MS. HUFF: As to the Court's additional language, we would like to reserve our objection based on the pending motion of law. If the Court overrules us on that motion, this is a fair explanation.

THE COURT: Okay. Everything okay on the next page? Plaintiff first.

MR. BLICKENSDERFER: I am reading the second paragraph now.

THE COURT: Okay.

MR. BLICKENSDERFER: Yes, we are okay with that.

THE COURT: Defense.

MS. HUFF: We would like to note on the -- we are fine with the ones removed. As to the one that remains, we would like the word substantial inserted, understanding your Honor's ruling on that. We are preserving our objection on that.

THE COURT: You have a standing objection any and all times I removed substantial.

MS. HUFF: Thank you.

MR. CURLEY: Thank you.

THE COURT: The next page is the page that begins with, after you take out the deleted part in the verdict form that I will explain in a moment, you will be asked to answer questions about this factual issue. And it goes down -- looking off my red line copy, it might be easier to read the clean copy to see how it reads.

So it says, with respect to what you must decide.

So, what the Court did was I took out "the parties have agreed that FAU officials acted under color of state law so you should accept this as a true and proven fact."

Everybody wanted the second element removed. Where it says the second element, looking go off the red line version, note: This does remove the definition for protected speech. Because of that, I removed the word "protected" from the entire instruction because it is no longer defined. That is why I use the word speech. I made that ruling assuming the Court rules the way the Court has drafted about a matter of public concern.

Everyone wanted the third element out and we reworded the last part because now it's just -- there is now only a single element.

To be clear, I used the word speech here, not blog speech.

The pattern sometimes says describe speech and sometimes it just says speech. When it says describe speech, I

used blog speech. When it says speech, I left it as speech. And when it says protected speech, I used speech because protected speech is no longer a defined term.

Both sides wanted that out, and the Court has incorporated the statement again if it is consistent with how the Court will rule. If not, we will have to revisit all of this on the prior page about the Court having found that Professor Tracy's blog speech was a matter of public concern.

So, with that explanation as to what the Court did, Plaintiff first.

Let us know when all of our jurors are here.

MR. BLICKENSDERFER: I understand what your Honor's thinking process was there. The pattern uses protected after a finding of protected speech.

In light of the Court's potential ruling, taking that away from the jury, we would ask on the prior page, after a matter of public concern, comma, and thus is protected speech. At that point the jury knows the Court has found the blog speech is protected. That is a finding the Court is taking from the jury.

Thereafter, we would like to have protected speech. We appreciate the Court's trying to balance what is a fair instruction. We note our objection to taking protected out thereafter, and have a standing objection every time the Court takes it out. We appreciate what the Court has done, we are

letting the Court know our position. We think it would be fair to insert it on the prior page if the Court is going to take it out. We will be okay with that if the Court does the other.

THE COURT: It appears both sides wanted the second element out.

The second element says, if the Court makes a finding that it is a matter of public concern, then he engaged in protected speech. It appears to be one in the same.

So, thus, your argument is on the prior page, perhaps if the Court should entertain the sentence, the Court has already found that Professor Tracy's blog speech was a matter of public concern and thus is protected speech, and therefore any other time the pattern instruction had protected, keep the word protected.

MR. BLICKENSDERFER: Yes.

THE COURT: The backup, if the Court doesn't add that word, go with speech.

MR. BLICKENSDERFER: Yes.

THE COURT: From Defense.

MS. HUFF: We disagree with the argument that this is taking it away from the jury. The jury never decides what is protected speech, that is a question of the Court in all instances.

There are two threshold questions, the first, whether the Plaintiff spoke as a citizen on a matter of public concern.

The second is the Pickering balancing, those are two questions the Court must consider before it goes to the jury. It is confusing to put protected speech anywhere in here.

THE COURT: Why do you think the pattern instructions are written that way?

MS. HUFF: Sometimes -- it says in the comments to the instruction sometimes there is actually a fact issue whether the speech was made. We don't dispute that.

MR. CURLEY: I need to jump in here. I don't mean to been cynical here, please don't take it that way.

In some cases you might have he said, this, this, this, identified, and in some cases you have a protected case and some of it wouldn't be, so you would be talking to the jury about that.

In this case, we don't even know what speech we are talking about. We have a blog, and who knows, and if you hang the label protected speech on it, you are protecting the entire blog. That is misleading and prejudicial.

It was their burden to identify the speech in cases where the pattern would be applicable. They haven't met their burden and now we are struggling with it.

MR. BLICKENSDERFER: We have a whole response to that argument that I understand the Court will hear soon.

THE COURT: Okay. Our jury is here. That is good timing.

Just to finish up on the next page, so I know we are done on that page that begins with, in the verdict form that I will explain, is there anything else? There is a standing objection to substantial.

I know Plaintiff wants protected.

Any other issues on that page?

MS. HUFF: Sorry, your Honor, I thought you were asking for Plaintiff's position.

MR. BLICKENSDERFER: No, the rest is fine, your Honor.

THE COURT: Defense.

MS. HUFF: With the Court noting our standing objection on substantial, everything else is okay.

THE COURT: Okay. So, quickly, so we know where we stand on the next few pages, we'll not address the specials now, I will tell you on the very next page, the only changes for the most part were that I did not accept -- I think it was from Defense -- certain portions that were not pattern.

There was a sentence that Professor Tracy exercised -- may not take action against Dr. Tracy for that reason. I am overruling that request and not allowing that in as deeming it not necessary in light of the Court's view that the pattern covers all of these issues.

And similarly, the Court is not permitting, but FAU may discharge Professor Tracy for any reason, good or bad, fair, unfair, even based on mistaken facts, so long as it was

not substantially motivated to retaliate for blog speech. The Court is not permitting that as well. The Court believes the pattern addresses that, so the Court is not adopting that, having heard argument on that yesterday.

In all other respects, the only changes were either taking substantial out or calling something speech. And this was an instance where the pattern would have referred to what I believe is just speech, this didn't call for a descriptive, and that is why it was written that way, following the pattern instruction.

So, with overruling the Defendant's requests, and with all standing objections remaining as to the substantial, is there anything objectionable from the Plaintiff on this page?

MR. BLICKENSDERFER: No, your Honor.

THE COURT: Defense.

MS. HUFF: Your Honor, all of our previous objections we would like to sustain or keep in.

We understand the Court's ruling on the stricken language, but FAU may discharge Professor Tracy for any reason, good or bad, fair, unfair, the pattern does mention that. We would like it to read, even if based on mistaken facts, because the Plaintiff has made --

THE COURT: I heard argument yesterday, I don't want reargument. I appreciate it. I considered the argument, that was yesterday.

The question now is, is there any other objection that is not of record? It definitely is of record, you preserved it. Any other?

MS. HUFF: No, we would like the even if based on mistaken fact language, no other objections besides the many we have preserved.

THE COURT: Okay. Then the next page, the Court also declines to deviate from the pattern where Defense requested the sentence begins with, if FAU's reason is one that might motivate a reasonable employer, and goes down to the sentence, FAU to be false, period, that is redlined out on Court Exhibit 3, and the Court considered argument yesterday on that and is declining to adopt that, not being part of the pattern and of a view the pattern takes care of the issue.

And furthermore, consistent with the way the Court has ruled on substantial, you will see that is out, and otherwise those were the changes to that page.

Any objection from Plaintiff?

MR. BLICKENSDERFER: No, your Honor.

THE COURT: Anything new? All standing objections from Defense remain. Any other objections?

MS. HUFF: We prefer of all of our previous objections and I will highlight the language that the Court struck. If it is not here, we want it there. The special instruction --

THE COURT: We have not discussed that yet. I want to

get through the last one and we will put this aside and bring our jury in.

The last page before we get to the special is, really, just consistent with what the Court has done, it adhered to the pattern. So, I am not using substantial, consistent with the ruling, and I don't think there was anything much more to that page which begins with, if you find in Professor Tracy's favor.

Anything objectionable from the Plaintiff?

MR. BLICKENSDERFER: Other than the standing objection taking out protected, we are good with this.

THE COURT: And your position is protected would only be in the pattern that refers to protected.

MR. BLICKENSDERFER: We want to stick with the pattern.

THE COURT: From the Defense.

MS. HUFF: Nothing besides the standing objections.

THE COURT: Okay. We will take a two-minute break and then we will bring our jury in to have you rest and we will resume.

(Thereupon, a short recess was taken.)

THE COURT: Really quickly, this is a question for Defense.

The legal doctrine for what you are requesting in -- let's look at Court Exhibit 3, on the page with the affirmative defenses so that I fully understand, and it is on the record.

There is no objection to combining defenses 1 and 2, responsibility for proof. There is a dispute for number 3 that says, FAU claims that Professor Tracy's claims are barred or limited -- and you have not provided legal doctrine and case law, you have not provided any case authority even in the original submission.

What is the case and legal doctrine you are relying on, not argument, just legal doctrine and case? You can start with the legal doctrine, what is the legal affirmative defense?

MR. CURLEY: Waiver.

THE COURT: Waiver?

MR. CURLEY: Yes.

THE COURT: Do you have any case law?

MS. HUFF: Not in a First Amendment retaliatory case.

THE COURT: You looked and have not found it?

MR. CURLEY: The Court knows you can waive constitutional rights, you can waive any constitutional right that I can think of.

THE COURT: I just wanted to understand the legal doctrine.

Okay. Let me ask you to put these on her desk. You have my one with the notes, and I am going to bring the jury in and I will pick up -- I need something to work off of to get to that decision-maker one. Where do I have that? There is a version -- where is Court Exhibit 4? I need a redline version.

All of these go on Melanie's desk, and this will go on afterwards when we talk about the jury instructions.

All right. Let's bring our jury in.

(Thereupon, the jury returns to the courtroom.)

THE COURT: Okay, good morning, everyone. You may be seated. Welcome back.

So, at this point, I turn to the Defense to ask whether you have any further witnesses.

MR. CURLEY: We have no further witnesses, your Honor, Defense rests.

THE COURT: Okay. And then I would turn to the Plaintiff to ask, do you have any rebuttal case?

MR. LEO: No, your Honor.

THE COURT: Okay.

All right. Ladies and gentlemen, so what that means is all of the evidence is closed, so this is going to be a short day for you. It was going to be short anyway, but it is going to be even shorter.

We are going to release you and then, when you come back Monday morning what will happen is, you will have a set of jury instructions and you each will have a set, I will read them, and you will take the jury instructions back with you when you deliberate. Then the attorneys will give you closing arguments, and you will go back to deliberate. That is what is happening on Monday.

With that, I need to make crystal clear nothing has changed about the rules of the road. Just because the evidence is in doesn't mean that is like a license to go and talk and, you know, review media and research and things of that nature. To the contrary. You have come so far, so much effort has been put into the case, and you are almost there.

The only time you start -- not really, the only time you talk about the case among yourselves, because you never talk with anyone else, is when you are back in the room deliberating, and all of the evidence is brought back there. I do not let you start deliberating until all of the evidence is brought back there. Nothing has changed. I am explaining procedurally what happens.

All you will hear is the law that I will give you, and we will continue to work on that, and the argument which the attorneys have a right to do on behalf of their clients.

Please, please, please, be ever vigilant, I know you have been every day, it is not that I am questioning it. I am saying this because I will not see you until Monday. You are like in a bubble, not what your friends say, relatives say, media, nothing but the witnesses and documentary evidence that was presented in the courtroom. It is very important you are insulated so that is all that is in your mind about this case.

Again, you should not be forming any opinions or discussing it with each other because you have not heard the

law. You will be able to apply the law to the evidence and as a group, as a jury selected to be fair and impartial in this case, you will go back to the room and you will deliberate.

I will tell you we will order you lunch on Monday. For anyone who brings lunch, you don't need to on Monday. By the time the instructions are read and closing arguments it will bring us to at or about lunch time. We will give you a menu in the morning and we'll order your lunch and you can deliberate with no interruptions to your day, and your interruptions will be however long they are. That is within your control.

Any questions about scheduling or anything I have just explained?

Okay, seeing no hands, we'll release you and see everybody back Monday morning at 9:00 a.m. Have a great weekend.

(Thereupon, the jury leaves the courtroom.)

THE COURT: Okay, let's pick up with the jury instructions, if we could. I heard argument on everything other than the specials.

I think that we have the Defense special instruction with respect to decision maker, and I think I heard Plaintiff say the other day that if the Court's ruling is consistent with how the instructions have been written thus far, again, without the benefit of full argument, and no ruling made, this would be

an attempt to put the instructions together, the Plaintiff would not be seeking that special, correct?

MR. BLICKENSDERFER: Correct, your Honor.

THE COURT: So, the Defense special, as I understand it, really boils down to ultimately the decision maker -- and you have a lot of language in the first paragraph, and in the second paragraph, but ultimately you are asking the Court to give an instruction about -- this is your last two lines: A decision maker is a person with the power to terminate an employee. In this case, the decision maker is Diane Alperin.

I will hear argument first from the Defense on that.

It would be helpful if you have legal authority that you rely upon. This is not the first case tried and gone to a jury where we have, you know, a Governmental entity as a Defendant. In fact, there is an instruction on Governmental entity and, you know, a Governmental entity, as that instruction indicates -- let me pull that up again.

Actually the third one, the fact that Florida Atlantic University is a Governmental entity must not affect your decision anyway. When a Governmental entity is involved, it may act only through people as its employees, and in general, a Governmental entity acts within the scope of their duties as employees of the Governmental entity.

I will let you make argument, but I always like to know if there's any legal authority for a jury instruction

where the judge is instructing the jury as to defining a decision maker, and also who the decision maker is and, of course, I know you have other language there and it may ultimately -- did I recall the Plaintiff objected to it, or there may be middle ground of agreement that may be speaking to the concept of a decision maker and the suggestion as to who? Maybe you agree or disagree with who the Defendant has designated as the decision maker. In any event, I will let the Plaintiff respond.

Let's hear the argument on the Defendant's special instructions right now.

MS. HUFF: Thank you, your Honor. As to the decision maker instruction, or as to the decision makers in general -- I will get to the argument about the law specifically in jury instructions, but we do have law defining a decision maker saying a decision maker in the termination context is someone with the power to terminate, not merely to recommend termination. That is an Eleventh Circuit case, Kamesky versus Dean, 148 Federal Appendix 878, 879 through 80, Eleventh Circuit case, 2005, defining what decision maker means in the termination context.

Additionally, the Alvarez case we cited to yesterday discusses the importance and pretext context, and that is where this would come up. You look at the employer's beliefs and not perceptions. Here, where we talk about the Florida Atlantic

being an employer, we heard so many employed by FAU, we do not want the jury to be confused whose decision they are to be considering. We want a decision by Dr. Alperin, they should consider her as the decision maker.

A Southern District of Georgia case, within the Eleventh Circuit, Pattee versus Georgia Port Authority, 477 F.Supp. 2d 1253, 1265, Southern District of Georgia, for intuitive protected conduct to be a substantial motivating factor in the decision, the decision maker must be aware of the protected conduct. This reflects the decision maker's awareness, so we have to define who the decision makers are.

I did look at decision maker instructions that have been made. The cases that I found specifically involved a specific factual instance involving sexual harassment cases and a cat's paw theory where maybe a supervisor did a bad act, but there was a decision maker above them. We don't have that here. That would render a decision maker instruction prejudicial.

And your Honor, I think there might be an attempt -- we are trying to avoid dragging in upper-level administrators in the case that are already dismissed in their capacity, specifically the president of the university.

There is no evidence regarding prejudicial involvement and that is why he was dismissed in his individual capacity, and if they try to drag him in above Dr. Alperin, that would be

inappropriate.

There are no other faculty members involved either. That should not be implicated or somehow suggested. We need to focus their attention on the decision maker in this case, it is undisputed she is the one who made the decision.

THE COURT: Okay. And from the -- let me pull that back up -- from the Plaintiff.

MR. BLICKENSDERFER: Yes, your Honor, our objection is noted in Docket Entry 388.

THE COURT: Okay, hold on a second. That is a separate process here if I pull that up.

MR. BLICKENSDERFER: I could read it. I want it noted for the record.

The Plaintiff objects to the inclusion of this special instruction as unnecessary in light of instruction 4.1 which already says that a public employer may discharge a public employee for any reason, good or bad, fair or unfair. And if the jury does not find the speech is a motivating factor, the jury is being charged it must not second-guess FAU's decision, and you must not substitute your judgment with FAU's judgment even if you don't agree with it.

That makes this instruction redundant.

THE COURT: Where are you reading from? What is at the top of the page?

MS. HUFF: Your Honor, I believe he is reading from 45

at Docket Entry 388, this is the parties' joint instructions. We included had ours in bold, and the Plaintiff added a paragraph at the end explaining why they objected to the instruction.

THE COURT: Is it in the redline version we have been talking about?

MR. BLICKENSDERFER: That is what I was looking for.

THE COURT: That is what I have in front of me, that is easiest.

MS. HUFF: It looks like it is not in there, their response. It was not a proposed instruction, it was a response to our proposed instruction. That is, I believe, what Mr. Blickensderfer is reading from.

MR. BLICKENSDERFER: Your Honor, I don't know what page this is, Court Exhibit 3, in the paragraph that begins FAU --

THE COURT: Hold on, I have a lot going on here, hold on one second. Are you pointing to anything that I need to refer to?

MR. BLICKENSDERFER: No, other than Court Exhibit 3, redline today. Earlier in 4.1, what we have agreed the jury can hear is, but a public employer may discharge a public employee for any good reason, good, bad, fair, unfair. There is no reason to read that again.

Later on it says, you must not second-guess the

decision and substitute --

THE COURT: Right.

MR. BLICKENSDERFER: That is redundant and does not need to be repeated. It would be prejudicial to do so.

THE COURT: You are talking about the first part?

MR. BLICKENSDERFER: Right. With respect to the decision makers, it seems to me FAU is back pedaling saying only Alperin is the decision maker. They admitted in their papers -- reading from Docket Entry 269, in the summary judgment papers where they say Plaintiff offers no material evidence to show that the decision makers, Drs. Coltman and Alperin, even considered Plaintiff's speech, and goes on.

So, they can make all the argument that they want, the only person who could make the call was Alperin, and Alperin didn't consider it. That is the argument they can make, but that should not be in the Court's instructions.

There is no standard on this particular decision maker issue. We do not agree to it, we think it would be overly prejudicial to kind of -- we actually think it would be wrong to tell the jury only consider Alperin when they said Alperin and Coltman were decision makers. This is argument area.

THE COURT: Hypothetically, if they propose putting Alperin and Coltman there, would there be an objection? Is there an objection to any instruction on who the decision makers were, or is it to how they have defined a decision maker

and who they have identified as a decision maker?

MR. BLICKENSDERFER: I think all of the above. I don't think we should agree to this instruction. We should stick to the patterns that are available. This is not a special that we would agree to, particularly with respect to the decision maker when they are changing the decision who can make the judgment call. The evidence is in evidence at this point, and there is no legal authority to say, yeah, there is only one or the other, and just these two that we should be comfortable with.

THE COURT: You think you should be able to argue whoever they want?

MR. BLICKENSDERFER: No, it has to be someone in the chain of command, whether it came from the president or president's appointee --

THE COURT: They want to make sure there is not an implication that the president, who is no longer a Defendant -- is there a preview of how the Plaintiff is going to be arguing this issue so we can avoid any problems and so maybe it could be handled in argument?

MR. BLICKENSDERFER: It is safe to say we are not going to say the president made this call in our closing argument.

THE COURT: Who are you going to say made the call?

MR. BLICKENSDERFER: Coltman and Alperin.

THE COURT: From Defense.

MS. HUFF: On 4.1, Plaintiff's request comment section, under Roman numeral III, individual liability.

THE COURT: I looked at that yesterday, that is individual liability.

MS. HUFF: It does discuss the official decision maker.

THE COURT: Let me pull that up.

4.1, and if we go to the section on -- it would be on page 52, Roman numeral III, individual liability.

MS. HUFF: Yes, your Honor.

THE COURT: A decision maker is officially liable under 1983.

MS. HUFF: Right. At the end of that paragraph, there is a sentence that says, "the model instruction presumes that the Defendant's status as an official decision maker is undisputed or has been resolved by the Court.

"In a case where a genuine fact dispute exists as to the Defendant's status as an official decision maker, the instruction and verdict form should be adapted accordingly," and provides principles of law that may be helpful in fashioning a jury charge.

I would like to direct the Court's attention to, "in the termination context, a Defendant is an official decision maker if he or she has the power to effectuate termination,

even if the termination decision is subject to further review. On the other hand, a supervisor who merely has the power to recommend a termination is not an official decision maker even if the recommendation is rubber stamped by the actual decision maker."

It is undisputed that Dr. Coltman did not have the ultimate authority to terminate Professor Tracy. She could make recommendations, but Dr. Alperin had the authority to make the final decision, and it was Dr. Alperin who drafted the final letters, made the final decision and effectuated the termination decision.

THE COURT: When I read this last night, I noted this, I did note it's in the context of an individual liability suit, which we don't have.

What you are saying is that the principles articulated within an individual liability suit might be applicable to expand upon the definition of the official decision maker even though it is not an individual liability case.

MR. CURLEY: We agree with the Court. Our concern is, as the Court noted, if you don't have an instruction on this, what does it enable? And we'd rather confine the argument to the facts of the case, that being clearly that Vice Provost Alperin was the person that made this decision, and prevent argument on the peripheral stuff that the Court allowed in for other reasons. There is some suggestion that those people are

the ones --

THE COURT: Well, we already heard a proffer from the Plaintiff that there will be no argument made that the people you call peripheral people are not going to be argued to the jury in closing that they were decision makers.

They are going to be arguing Coltman and Alperin presumably based on, you know, based on what evidence is in the record, and presumably the argument will be in line with the evidence in terms of what each of the respective roles were, whether it was one recommended and the other one ultimately made the decision, but that is what I just heard.

MR. CURLEY: I heard it as well.

THE COURT: They are citing to your summary judgment motion. Did you all put forth those were the two decision makers? It looked like they were citing from the Defendant, calling them both the decision makers.

MR. CURLEY: I am not sure, but I know what the evidence was at trial. I think that is what the jury instructions are supposed to be based upon, so that is what I would like the Court to do.

The summary judgment motion, I don't mean to make light of that, your Honor, but the summary judgment motion may have referred to Dean Coltman providing information, which is what the testimony was, that Diane Alperin relied upon.

THE COURT: What would you been arguing about Dean

Coltman's role and Vice Provost Alperin's role, I don't want you to give away your closing, but vis-a-vis the decision making issue?

MR. BLICKENSDERFER: I would like to hand this over to who is preparing for that argument.

THE COURT: What is the proffer on the closing on that limited issue so we know what we are talking about?

MR. BENZION: We do intend to argue that they were involved in the retaliatory discipline efforts and decision to terminate him, both Coltman and Alperin were part of that decision.

THE COURT: And you would be relying on respective roles based on the evidence?

MR. BENZION: Yes.

THE COURT: You would be referring to anybody as an ultimate decision maker, is that fair to say, or talking about them in the context of their respective roles?

MR. BENZION: I think they both contributed to the decision, and that is what we will be arguing. That is what the evidence plainly showed.

MR. CURLEY: I can't argue with that. That is what the evidence was. That being said, I would still like the instruction because the jury needs to know, okay, this is what we base our decision on. They need some guidance on that.

MR. BENZION: Your Honor, may I add one more thing?

THE COURT: Yes.

MR. BENZION: The Plaintiff would like to point to the Defendant's Exhibit 206 in evidence which demonstrates that Dr. Coltman did have the authority to discipline and terminate, a termination letter signed by Dean Coltman to another professor, the authority is there, it is in the record.

THE COURT: Defense is saying it doesn't disagree with the fact that they both contributed.

Okay, I think we've heard argument on all of the jury instructions, right? I think so.

So, let me just put this aside for a moment.

MS. HUFF: Your Honor, as to our special requested instruction, we see it as in three parts, I want to make it clear for the record, one is the decision maker we just discussed, our position is clear.

The second is language about not being able to second-guess the supervisors' beliefs and business judgment. I believe that appears earlier in the instruction. We would like the supplemental language in there and think it should be in there. For your consideration, your Honor, it is from the same cases that the pattern cites to, it just elaborates on the point.

And the third is mistaken belief or erroneous facts. I understand your Honor's ruling on that, that is why we added that as well in the special instruction, and we would like that

as well.

THE COURT: All right. Let me bring this back and we will go into any argument.

Okay, at this point we'll hear argument. Plaintiff wanted to make a motion and argument, and so what is the motion and what is the argument? Can I ask approximately how much time you are going to be using?

MR. BLICKENSDERFER: I don't think more than 30 minutes.

THE COURT: We still have to finish jury instructions. You know what the Court knows and what the Court has heard, try to direct the Court to the primary points you want.

MR. BLICKENSDERFER: We will move for a Judgment as a Matter of Law on the retaliation claim with respect to the essential element of his speech, that Professor Tracy's online speech and blogging regarding Sandy Hook and mass casualty events were constitutionally protected.

Plaintiff also renews all legal motions at Docket Entry 247 previously made, including arguments and motion for summary judgment with respect to the policy and with respect to the issue of qualified immunity.

The Court mentioned yesterday if there is anything Plaintiff left off with respect to the protection of the speech he could address this today. I will not address what I have already addressed. I will stick to what is new.

I neglected to talk about the initial decision. There must be an initial determination whether the speaker has spoken in his role as an employee or citizen.

It is our first position that Professor Tracy spoke in his capacity as a private citizen on a personal issue or hobby outside of work hours. Defendant conceded when they insisted that he use a disclaimer on his blog to publicly announce to the world that he was blogging in his private capacity and not in any official capacity on behalf of FAU.

The law is well established that private citizens have a First Amendment right to criticize public policies. Bradley versus Computer Science Corp., 643 F.2d 1029, at 1023, Fourth Circuit, 1981.

Regardless, even if this was within the scope of his employment, Plaintiff was speaking on a matter of "public concern." A matter of public concern is one that relates to any matter of political, social or other concerns to the community. Connick versus Myers, 461 U.S. 138, at 146, 1983.

The purpose of the public concern threshold test is to prevent federal courts from becoming "a round table for employee complaints over internal office affairs." To let the Court appreciate that, that is why we are saying he was blogging in his private capacity, he was not blogging about internal affairs at FAU. That is the Plaintiff's position.

Here the news events that were the subject of mass

media coverage and critiquing of the Government are a subject of legitimate news interest, just ask the media coverage that has been outside.

Alperin admitted he was writing on matters of public interest and "speech by public employees on a matter related to their employment holds special value precisely because the public employees gain knowledge of matters of public concern through their employment." That comes from Lane versus Franks, 134 supreme Court 2369, at 2379, 2014.

Under Rankin versus McPherson -- would the Court like me to submit the citations to the case later to save time?

THE COURT: That is fine.

MR. BLICKENSDERFER: Under Rankin versus McPherson, "the inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern."

In addition, Professor Tracy's speech is political speech that constitutes political expression as relates to gun control and political speech is the broadest protection. This is McIntyre versus Ohio Elections Commission. He was also speaking at a university, albeit outside of office hours, but he was speaking at a university.

Reading from Sweezy, this is an important quote, "the essentiality of freedom in the community of American universities is almost self-evident. Teachers and students

must always remain free to inquire, to study and to evaluate to gain new maturity and understanding, otherwise our civilization will stagnate and die." Opinion cite 250. Even hate speech is protected under the First Amendment. We cited a plethora of cases on page three, footnote two.

As for a response to the Defendant's argument, what speech are we talking about, that is what their argument is. They are scratching their heads, they don't know what speech we are talking about. Defendant can't say they don't know what speech the Plaintiff is referring to when he says he was fired for his speech, such that the Court and jury cannot consider the First Amendment claim. That is what this is about.

Everyone knows the speech we are talking about consists of his online speech concerning Sandy Hook and other mass casualty events on his blog, podcasts and social media in the fall of 2013, and continued up to December of 2015, when he was terminated, and included in that was the Pozner fiasco in the *Sun Sentinel*.

I can refer the Court to specific testimony if necessary, but the Defendant admitted the blog was no mystery. Diane Alperin and Heather Coltman both admitted to reading his commentary on Sandy Hook in 2013, and we argue even later, as well as the writings related to the Pozners after the op-ed came out. They cited Kurtz and Goffer, and cite other cases in the paper they filed yesterday.

Kurtz versus Vickrey. Kurtz's speech, different from Tracy's, consisted of different statements, memoranda and letters published over a period of years, and critically, only some speech related to matters of public concern; the rest was unprotected speech. Thus, the Eleventh Circuit held, and this is a quote, "it would be reasonable for the District Court to separate those instances of speech which clearly do not relate to a matter of public concern from those which do for the purposes of applying the Pickering balancing test and presenting the causation issues to the jury under Mt. Healthy."

We recognize it might be relevant for causation purposes, pursuant to the language, to identify the speech.

As we have identified, we know what speech we are talking about, and all of it is a matter of public concern.

I refer the Court to the Goffer decision, and the same was true here. There the complaint did not identify discrete expressions of speech. Moreover, the speech was made on "different subject matters to different people in a wide range of circumstances."

Consequently, the Court held the First Amendment issues -- this is a quote, "First Amendment issues could not be addressed in the unitary or global fashion employed by the Plaintiff and the District Court," and that is the end of the quote, so the Pickering and Connick test could be carried out.

I refer to Bailey v. Department of Elementary and

Secondary Education which supports our position. There the Plaintiff "failed to describe specifically for the District Court all the speech forming the basis for his claim."

Vague references to blog speech, our argument, is inadequate; rather the speech at issue is online speech concerning Sandy Hook and other mass casualty events, including postings related to the Pozner op-ed.

All of that speech relate to matters of public concern or interests and form the basis of Plaintiff's theory of causation, and the jury can adequately determine causation from that. Plaintiff has identified discrete expressions on the same online mediums, podcast and social media.

Plaintiff has identified when Defendant became aware of this speech and when the Pozner op-ed fiasco ensued, the strict time line everyone is debating.

The cases the Defendant relies upon do not say, as the Defendant argues, that the Plaintiff "must point to specific speech he believes was protected" to succeed on his claim or prove causation.

Accordingly, the Court can and should determine that Tracy's speech was constitutionally protected.

That is the constitutional speech argument. I will be brief, but I would like to make our record.

We move for a Judgment as a Matter of Law on Counts 3, 4, and 5, constitutional challenges to the policy.

The Court should reconsider its earlier rulings on the challenges to the policy, Docket Entries 362 and 392. The Court's prior ruling was based on Hawks, critically, however, Hawks is not a First Amendment case, and we think that distinction deserves revisiting this issue because Courts have noted that there is at least one additional concern regarding vagueness in cases such as ours that implicate the First Amendment, namely the risk of chilling speech, that was not implicated in Hawks.

To recap Plaintiff's constitutional vagueness claims, Plaintiff alleged, under 42 U.S.C. Section 1983, that FAU acted in a way that deprived him of a constitutionally or Federally protected right specifically through its conflict of interest policy and how it was used to violate First Amendment rights as applied to him, and broadly, that it violated the rights of others, the facial challenge.

The First Amendment prohibits law restricting free speech and the Fourteenth Amendment imposes that limitation on legislation power of states, including their political subdivisions like FAU. The Court correctly allowed Plaintiff's 1983 First Amendment retaliation claim to proceed, but not the other First Amendment claims pursuant to the CBA. Respectfully, this was error and should be reconsidered at this time because of a fundamental difference between this case and Hawks.

Courts have identified, with respect to vagueness, concerns that "vague laws may trap the innocent by not providing fair warning." That comes from a case called Grayned v. City of Rockford. All of this will be provided.

This is the type of concern that was implicated in Hawks. In Hawks versus City of Pontiac, it was not about a policy that was allegedly vague as applied on its face that violated free speech. It was about a due process vagueness claim regarding a residency requirement in a CBA that originated from a city charter.

Essentially, the holding in Hawks is that a residency requirement in a CBA could not be invalidated on vagueness grounds, does not say anything about challenging a school policy for violating the First Amendment on vagueness grounds.

I would like to address another case illustrative as to the issue of differences between an ordinary due process claim and free speech, and that is Hamilton versus U.S. Postal Service, 746 F.2d 1325, an Eighth Circuit decision, 1984.

In that case, postal employees subject to a CBA contested their suspensions based on absenteeism at work. They allege the CBA was vague and the employees grieved it and lost. Then they took the case to court and argued the CBA was unconstitutionally vague. The Court rejected the arguments, and the reason why is critical.

The Court noted that a constitutional violation, such

that the vagueness impinged upon their First Amendment rights, had not been alleged, and says harmonizing discordant provisions of the CBA was the arbitrator's job at the end of the day. That is not this case.

Here, Plaintiff has alleged that the policy, the vague policy has impinged and inhibited his free speech.

We refer to Grayned versus City of Rockford, 408 U.S. 104, and Westbrook versus Teton City School District No. 1, 918 F.Supp. 1475, a Second Circuit decision from Wyoming, 1996.

Vagueness claims that implicate the First Amendment are more heavily scrutinized because more is at stake.

Cramp versus Board of Public Instruction of Orange County, 368 U.S. 278, at pages 287, 88, a U.S. Supreme Court decision, "the vice of unconstitutional vagueness is further aggravated where, as here, the statute in question operates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution. Stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act on his peril here because the free dissemination of ideas may be the loser."

Here, FAU implemented a conflict of interest policy, a Governmental policy that unconstitutionally chilled the speech of Plaintiff and others. The Court previously ruled that it would not consider these challenges based on the premise that

the conflict of interest policy was contained in the CBA that Plaintiff signed, but as the Court has heard testimony, the policy is much, much more than that.

Further, we ask the Court to look at Exhibits 23 and 15. 23 contains a list of all of the things that constitute the policy, including university regulation 5.011, which the Plaintiff never agreed to, the form that Plaintiff never agreed to.

Also, we refer for the Court to the signature block contained on the form that Plaintiff never agreed to which says, I hereby certify outside employment or professional activity reported here does not constitute a conflict of interest under Chapter 112 of the Florida Statutes and will not interfere with my assigned duties at Florida Atlantic University.

Professor Tracy, when he signed the CBA, could not have waived his First Amendment rights to challenge the policy in this Court because the policy was so vague he could not possibly have understood or have known at the time that any First Amendment rights were implicated by the CBA.

Now, we heard waiver before, but waiver of a constitutional right must be knowing and voluntary, if it can even be required at all. I refer the Court to Borough of Duryea, Pennsylvania versus Guarnieri, 564 U.S. 379, a 2011 decision. "There are some rights and freedoms so fundamental

to liberty that they cannot be bargained away in a contract for public employment. Our responsibility is to ensure that citizens are not deprived of these fundamental rights by working for the Government."

It is our argument that the Plaintiff could not have known that the CBA would have been enforced and interpreted by FAU officials in the manner it was to require that he report virtually anything he does outside campus online, including on his personal blog. Blogging is nowhere identified in any rule or policy being subject to disclosure.

He thus could not have waived his right to challenge the policy through signing the CBA, because the policy was so vague he could not possibly have known that any First Amendment rights were implicated by the CBA.

We previously argued the substantive 1983 claims on First Amendment rights don't need to be grieved. This comes from Patsy and its progeny. I will specifically refer the Court to what was previously cited in our papers.

Naurumanchi v. Board of Trustees of Connecticut State University, a Second Circuit decision, 850 F.2d 70, states "nor is it permissible, in light of Patsy v. Board of Regents, to require initial recourse to available state proceedings, including union grievance proceedings, for the enforcement of First Amendment rights protectable in Federal Court pursuant to 1983."

Now, as the Defendant previously argued, that is a retaliation claim, and we agree.

That does not necessarily mean that Professor Tracy had to grieve this vagueness challenge that impinges, that touches upon his First Amendment rights. That is our position.

I refer the Court to Clark versus Yosemite Community College District, 785 F.2d 781, Ninth Circuit, 1986.

THE COURT: It is 20 minutes, wind down.

MR. BLICKENSDERFER: In that decision, there is no need to -- I will move on. The Court never reached the merits of our arguments with respect to the policy being content based and vague. I will hit the highlights, but this is stuff that is in Docket Entry 247, and we reraise race those arguments at this time.

He policy is unconstitutionally content based and on its face draws distinctions based on the message a speaker conveys; cannot be enforced without reference to the subject matter of the employees' speech to determine whether it what contradicts Defendant's "public interests", which were never defined.

The requirement to disclose blogging here serves no legitimate Governmental functioning since the Plaintiff's blog was publicly available to everyone, free speech activity does not present a conflict of interest with the goals of the university, and the Collective Bargaining Agreement says

nothing about agreeing to disclose blogging or that outside free speech activity is subject to the CBA or that it must be grieved if violated by Plaintiff.

Your Honor, the policy is unconstitutionally vague because reasonable people, including FAU's own faculty and other staff, don't understand what it prohibits, and it encourages discriminatory enforcement and facilitates censorship, as we argued is the case here.

Tracy and several other testified they were absolutely confused about the policy and what to report. This is understandable. And the form contains a space for a "Description of employment activity" yet does not include any space to fill out non-employment activity.

There's no rule for online speech like blogging or social media, nor could blogging be subject to disclosure as the First Amendment protects the right to engage in anonymous speech. That is stemming from Tally versus California, 362 u.S. 60, 1960.

Your Honor, just to hit the highlights, consider how a conflict of interest is measured under this policy, consider the consequences of non-compliance not set forth in the policy.

The redline version is a clear example of that. They didn't know if they should reprimand him for it or terminate him because there are minimal guidelines. The result is arbitrary and selective enforcement and vague as well on its

face.

As a last note on the issue, I will move on, the First Amendment protects against speakers from being treated differently. Again, in the motion for summary judgment, Docket Entry 247, we argued this. Some faculty members at FAU are allowed to blog or write online without making disclosures. This is commonly referred to as the First Amendment equal protection doctrine and it violates that.

We have argued the issue of ripeness which the Court mentioned in the order on this motion. This claim is ripe because Tracy was fired and this circuit, the Eleventh Circuit, under the Wollschlaeger versus Governor, Florida decision, tolerates pre-enforcement challenges that implicate the First Amendment. 848 F.3d, 1293, Eleventh Circuit, 2017.

THE COURT: Okay, final argument.

MR. BLICKENSDERFER: I will be brief. We argue that Coltman and Alperin are not entitled to qualified immunity. The Court should reconsider your ruling on that issue. A reasonable Government official cannot reasonably believe that they can retaliate against an employee based on the exercise of First Amendment rights, even when purportedly acting pursuant to some other policy.

There are material facts in dispute with respect to Defendant's purported lawful reason for the firing, which is Plaintiff's alleged insubordination, and it is not established

that was an actual motivation.

Plaintiff was disciplined under a vague policy that repeatedly went unenforced and about which several faculty members had expressed confusion, including the Plaintiff, and he was on paternity leave at the time and after he said he wanted clarification he was disciplined.

Diane Alperin admitted she was waiting to see the blog on the forms, and Heather Coltman thought that the Plaintiff was a nut job and reading his blog and looking for winning metaphors.

Plaintiff asks the Court to follow Bogle v. McClure, 332 F.3rd 1347, Eleventh Circuit, 2003. This is in line with the mixed motives decisions, which are all distinguishable here. In Bogle, the Eleventh Circuit concluded that the Plaintiff set forth sufficient evidence suggesting that the Defendant's stated lawful reason, system wide, "was a sham designed to cover up race-based transfers."

Viewing that evidence in the light most favorable to the Plaintiff, the record did not indisputably indicate that the Defendants were actually motivated, even in part, by objectively valid reasons. Bogle did not require the Defendants to show that they were motivated only by lawful reasons, but concluded that Plaintiffs had put forth enough evidence to call those partial lawful motivations into question.

The same is true here, and the Court should revisit that argument.

THE COURT: Any response from Defense?

I didn't know if there is a supplement. You argued your motion in full yesterday, no new evidence was put in. If there is anything you want to supplement, not repetitive, but supplement to what you said yesterday, start with that first, any supplement and then an opportunity to respond by Plaintiff.

MS. HUFF: Yes, your Honor. As to the supplement, we would like to add, based on the testimony of Jason Ball, he testified about the timing of the email that Heather Coltman sent to Diane Alperin attaching a draft to the termination decision.

We established -- Plaintiff established in that case that the email was sent at 4:23, prior to when the Pozner op-ed was circulated at 4:25. We feel the point was already made, but it appears the email was sent five hours before instead of two minutes before. Either way, they haven't shown that the university administrators knew about the Pozner op-ed piece when they made the termination decision.

And we have information that the Pozner speech was not written by Plaintiff and it was critical of actions by Plaintiff that were not a matter of public concern, specifically the certified letter of the copyright claim. That is our supplemental.

THE COURT: Okay. Now response to Plaintiff's motion.

MS. HUFF: Yes, your Honor.

Your Honor, Plaintiff highlights that we have to determine that Plaintiff spoke in his role as a citizen on a matter of public concern. It's impossible to do that until we know specifically what speech he is talking about, and I can illuminate some of those concerns.

If they are talking about the blog generally, we have unrefuted evidence from the Plaintiff that he did not write everything on his blog, he had guest authors. We have an exhibit in evidence from a filmmaker who published an open letter, a Canadian filmmaker. We have Freeform Friday where they can post on the blog.

The only evidence that we have of Plaintiff's blog speech is two post's, one from December 24, 2012, and one from January 6, 2013. That January 6th post is a time line, Plaintiff testified, where he was summarizing other news articles. I am not sure that counts as his speech, and we don't have any other evidence as to what is on the blog.

Yesterday, Plaintiff's counsel mentioned that we have a summary with all of the blog articles in evidence.

While that is true, it is merely titles of the blog articles, and a view of the titles shows it is not all about Sandy Hook, there is the Boston Marathon bombing, several other issues, and it is impossible to make a determination about

whether the Plaintiff was speaking at all, whether he was speaking as a citizen on public concern, unless you are looking at a specific blog post, and to review those posts and make a determination is the Court's role on that first prong.

As to the attempt to expand the speech to the podcast and to social media, we don't have anything in evidence as to the content of the podcast, we don't have a recording, or have a transcript of any podcast episode. As to social media, we don't have anything regarding Plaintiff's media activity.

I believe reference was made through a hearsay statement about a Twitter account. Frankly, that cannot be the basis of a First Amendment retaliation claim.

As to Plaintiff's attempt to distinguish our case law, the Kurtz case, your Honor, we would submit this is just like the Kurtz case where several memos and oral statements were made over a matter of years. Essentially, that is what Plaintiff is arguing, that he made statements about Sandy Hook on his blog over a matter of years.

We need to know what statements they are talking about, whether he was speaking as a citizen or speaking on a matter of public concern.

Similarly, this is just like the Goffer case we cited. In that case, the Plaintiff argued that the Plaintiff was making speech on different subject matters and to different people. The same is true here, unrefuted testimony shows that

there are several different subject matters discussed in the blog, and we don't have evidence -- you would have to be relying on speculation about what the blog is actually about. We need to see the blog posts they are relying on for the First Amendment retaliation claim.

Your Honor, I argued this yesterday, so I want to re-emphasize the point very briefly. The tension related to the Pozner op-ed, all of that happened after the termination decision was made, that is unrefuted in the evidence. We heard Heather Coltman testify she sent a notice to Diane Alperin at 4:23 p.m., and all the notice about the Pozners did not begin until 4:25, at the earliest, from FAU's perspective. We would like to preserve the argument that is not -- that is -- Mr. Fitzer was doing a lot of the drafting of that response.

I would like to highlight that Plaintiff completely -- in their motion today did not address the Pickering balancing at all. It is the Plaintiff's burden to prove that his interest outweighed the university's. Left with what we have, we have evidence, really a cascade of evidence showing the disruption going on at the university in 2013 and again in 2015.

The case law says that an employer does not have to wait for the disruption to happen; if they reasonably believe that it is going to happen, they can take action.

As to the point about if the university has never said

this is about Plaintiff's speech, that is true, we maintain that it was about his insubordination. However, there is Eleventh Circuit case law cited to by Ms. Griffin which she has provided me, Bryson versus City of Waycross, 888 F.2d 1562, a 1989 case, Eleventh Circuit.

In cases where the state denies discharging the employee because of speech, a four stage analysis has evolved, and it goes on to talk about the four stage analysis we have been discussing. The second prong is, if the speech addresses a matter of public concern, then the Court applies the second prong of the Pickering balancing test weighing the employee's First Amendment interest against the state as an employer -- it performs through its employees --

THE COURT: This was argued yesterday.

We need to wrap up. Any points you haven't made yesterday or today?

MS. HUFF: As to their argument on the reconsideration, we addressed all the points I would raise today, and I believe that is their motion for reconsideration of the partial motion for summary judgment. Our response encapsulates everything I would say today.

THE COURT: Okay.

MS. HUFF: Sorry, your Honor, we are trying to get you the Docket Entry for that.

THE COURT: I can find it. Your docket response to

their motion for reconsideration?

MS. HUFF: Correct.

THE COURT: Okay. All right. Thank you.

Okay. We have heard fully from the Plaintiff.

MR. BLICKENSDERFER: Unless the Court has any questions.

THE COURT: No. We will take a brief recess. Thanks.

MS. HUFF: Your Honor, yesterday we were not allowed -- not not allowed -- we did not argue that we believe the sufficiency of the evidence outweighs on the causation prong. Would you hear argument on it briefly? This is a factual issue. We believe it outweighs --

THE COURT: How long do you need to argue that?

MS. HUFF: A couple of minutes, your Honor.

THE COURT: Okay, you may proceed.

MS. HUFF: Your Honor, we believe Plaintiff has failed to meet his burden of showing his speech was a substantial motivating factor. You heard repeated testimony from Heather Coltman and Diane Alperin that his repeated acts were insubordination, and Plaintiff did not present any evidence to show this is not the true reason, they relied on unsupported speculation.

We discussed yesterday briefly, and I will go through these points quickly, that there is no causation through temporal proximity. We have the 2013 speech, the only speech

we have evidence of from the blog, and after three years Plaintiff was permitted to blog, teach on conspiracy theories and was not retaliated against in any way. And in cases where we don't have temporal proximity, there is additional -- we have proof that the employer was contemplating a discipline action before the speech occurred, temporal proximity -- that is 2015, sorry.

When there is a significant time gap like here, the Plaintiff must offer evidence to demonstrate causal connection, that could be antagonism or the first opportunity for the employer to retaliate. We already said there is not a pattern of antagonism. As to retaliate, that would be back in -- FAU administrators met with the Plaintiff, discussed his blog with him and gave him all of the tools he needed to keep blogging the way he wanted to, he would simply have to follow the rules of the disclaimer, and he was unable to do that.

We made our arguments regarding comparators, I will briefly note those points.

THE COURT: Only if it is new, there has been a lot about comparators.

MS. HUFF: I want to re-emphasize that it's the Plaintiff's burden to show pretext once the employer puts the reason forward. There are no valid comparators, or no other evidence that we have seen, that the proffer for the termination was not the correct reason.

THE COURT: Okay. Thank you. Is that everything?

We will take a brief recess, thanks.

(Thereupon, a short recess was taken.)

THE COURT: Okay, we might have to ask our exhibit helper -- Pauline has to take everything down. I appreciate you trying to help with the exhibits.

If we have time at the end it might be nice, I need to make sure those are all in order to give to our jury.

So, here is what I am going to do. I am going to first make the ruling on the motions and distribute the packet of the jury instructions that relate to the issues that we discussed.

So, the Court has heard argument on the Defendant's motion for Judgment as a Matter of Law. Federal Rule of Civil Procedure 50 (a) states that if a reasonable jury would not have a legally sufficient evidentiary basis to find for a party on an issue, the Court may resolve the issue against the party and may grant a motion for Judgment as a Matter of Law against the party on the claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

The standard that governs a Motion for Judgment as a Matter of Law is that if the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a

contrary verdict, granting of the motion is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury.

It is the function of the jury as the traditional finders of fact and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses.

Watts versus Great Atlantic and Pacific Tea Company, 842 F.2d 307, Eleventh Circuit, 1988. All the evidence must be viewed in the light most favorable to the non-moving party. Gupta v. Florida Bd. of Regents, 212 F.3d 571, 582, Eleventh Circuit, 2000. Here, the thrust of the Defendant's argument is that Plaintiff does not have sufficient evidence to establish a prima facie case and, furthermore, that Defendant does not have sufficient evidence that Defendant's non-discriminatory reason for termination, insubordination, was pretextual.

Defendant has argued several times through the course of Plaintiff's case that Plaintiff's evidence of comparators is insufficient, that his comparators are simply not similarly situated enough to Plaintiff, and as a result, Plaintiff cannot show a similarly situated employee that, after his particular kind of insubordination, was not terminated.

Comparator evidence is not the only type of evidence by which the Plaintiff may establish his claim.

"Establishing the elements of the McDonnell Douglas framework is not, and never was intended to be the sine qua non" -- this is all in quotes -- pronounced sinuh quwhy non -- for a Plaintiff to survive a summary judgment motion or a motion for Judgment as a Matter of Law, in an employment discrimination case. Accordingly, a Plaintiff's failure to produce a comparator does not necessarily doom the Plaintiff's case. Rather, the Plaintiff will always survive summary judgment, or Judgment as a Matter of Law, if he presents circumstantial evidence that creates a triable issue concerning the employer's discriminatory intent." Smith v. Lockheed-Martin Corp., 644 F.3d 1321, 1328, Eleventh Circuit, 2011.

Here, the Court extensively evaluated Plaintiff's evidence on summary judgment and determined that Plaintiff has demonstrated "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its actions that a reasonable fact finder could find them unworthy of credence."

Plaintiff's evidence, both at summary judgment and at trial, creates a triable issue of fact, from the perspective of a reasonable juror, as to why he was terminated. Plaintiff has evidence that there was pressure upon Defendant to terminate

him because of his speech, pressure that never ceased, despite the passage of time. He has evidence of personal animus against him, due to his speech, by decision makers at Defendant. He has evidence that Defendant continually and carefully monitored the Plaintiff while that pressure was present. He has evidence of a meeting, soon after his speech was public, wherein, if the evidence is viewed in Plaintiff's favor, a plan was created to terminate Plaintiff.

If the jury were to agree with Plaintiff that such a plan was formed, evidence then shows that Defendant acted on that plan.

The Plaintiff has evidence that the Defendant singled out Plaintiff's online speech as needing a disclaimer drafted specifically by the Defendant. While that particular discipline action ended in a settlement agreement, not termination, the settlement agreement placed restrictions on Plaintiff that, again viewing the evidence in Plaintiff's favor, caused there to be additional grounds in the future to terminate Plaintiff as compared to other faculty members.

The evidence has further showed that Defendant's outside activities policy was confusing to some, including Plaintiff, and that the policy underwent revision soon after Plaintiff was terminated. Notwithstanding that revision and earlier confusion, the earlier draft of the policy was applied against Plaintiff, and the policy was applied in a manner that,

viewing all evidence in Plaintiff's favor, could show that the Defendant was seizing upon an opportunity to terminate Plaintiff because of his earlier protected speech.

In summary, Plaintiff has introduced sufficient evidence to call into question whether Defendant actually terminated Plaintiff for insubordination. In order to prevail on his retaliation claim, Plaintiff is required to "establish a prima facie case by showing, one, statutorily protected expression; two, adverse employment action; and three, a causal link between the protected expression and the adverse action." Goldsmith v. City of Atmore, 996 F.2d 1155, at 1163, Eleventh Circuit, 1993. Plaintiff has evidence in support of all three elements.

Finally, the Court addresses a few of the Defendant's specific arguments. Defendant argues that Plaintiff has not properly identified his protected speech. The Court disagrees. Plaintiff's blog postings, particularly his blog postings about Sandy Hook, have been properly identified. A reasonable juror could conclude that the Defendant was aware of Plaintiff's protected speech prior to terminating him and that a causal connection existed between that speech and Plaintiff's termination notwithstanding the passage of time.

Furthermore, the Court does not believe the Plaintiff's references to "blog speech" in this case are vague or otherwise do not properly identify Plaintiff's speech. The

Court concludes that any time Plaintiff or Defendant reference Plaintiff's "blog speech," both the Court and the jury know exactly what that means -- it means Plaintiff's blog speech on mass casualty events such as school shootings, the Sandy Hook massacre, and Government conspiracies in general.

Defendant argues that Plaintiff's speech does not qualify as speech that may be submitted to the jury under a Pickering balance test. The Court will address that in a separate ruling.

For all of the foregoing reasons the motion is denied.

With respect to Plaintiff's motion for Judgment as a Matter of Law the Court will address -- with respect to Plaintiff's second request for the Court to reconsider a prior ruling on summary judgment, that is improper argument for a motion as a matter of law. A motion must be premised on evidence produced at trial, and evidence at trial cannot establish a claim that is not before the Court.

Furthermore, Plaintiff raised arguments not previously brought before the Court on summary judgment, which is an improper basis for a motion for reconsideration, Plaintiff's motion for Judgment as a matter of Law, and the motion on this issue is denied.

So, I referred yesterday to the case of Moss versus City of Pembroke Pines at 782 F.3d 613, Eleventh Circuit, 2015 that suggests to this Court that the issues that the Court is

about to discuss relating to the classification of speech and the Pickering balance is to be determined as a matter of law by the Court and is to be handled at the conclusion of evidence.

The Supreme Court has set forth a two-step inquiry into whether the speech of a public employee is constitutionally protected. The first requires determining whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action based on his employer's reaction to the speech. If the answer is yes, then the possibility of a First Amendment claim arises.

The question becomes whether the relevant Government entity had an adequate justification for treating the employee differently from any other member of the general public based on the Government's interest as an employer. Garcetti v. Ceballos, 547 U.S. 410, 2006.

Both steps are questions of law for the Court to resolve. That is Moss versus City of Pembroke Pines, 782 F.3d 613, Eleventh Circuit, 2015.

With respect to the first step of the inquiry, whether a Governmental employee speaks as a private citizen or as a public employee, "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from

employer discipline." That is the Garcetti case, 547 U.S. at 421.

A determination as to whether an employer is speaking as a private citizen turns on such factors as the "role the speaker occupied" and "the content of the speech." Davis versus McKinney, 518 F.3d 304, 312, Fifth Circuit, 2008.

The "central inquiry" is whether "the speech at issue" also in parens, "owes its existence to the employee's professional responsibilities." Garcetti, 547 U.S. at 421. Practical factors that may be relevant to, but are not dispositive of, the inquiry include the employee's job description, whether the speech occurred at the workplace, and whether the speech concerned the subject matter of the employee's job. Moss, 782 F.3d, 618.

Here, the Court has considered the evidence on Plaintiff's speech. Plaintiff's speech, which has commonly been referred to in this case as "Plaintiff's blog speech" refers to Plaintiff's blog postings about mass casualty events, school shootings, the Sandy Hook massacre, and Government conspiracies in general. The Court concludes that Plaintiff's blog speech do not owe their existence to Plaintiff's responsibilities as a faculty member at FAU.

That speech owes its existence to Plaintiff's personal interest created during his personal time on his personal blog. The Court acknowledges that there is some evidence that a very

small portion of Plaintiff's speech may have occurred at his workplace, with FAU equipment, and that there is some general overlap between the subject matter of Plaintiff's online speech and the courses taught by Plaintiff.

Even so, as the Eleventh Circuit noted in Moss, these factors which do in totality weigh in favor of finding that the Plaintiff spoke as a private citizen, are not dispositive. What is dispositive is whether the speech owes its existence to Plaintiff's responsibilities as an FAU faculty member.

The Court fails to see how there could be an argument to the contrary on this point. FAU is specifically aware of Plaintiff's online blog speech and required Plaintiff to place a custom-drafted disclaimer on his blog proclaiming that the blog speech has no connection with FAU.

The Court fails to see how FAU could argue that Plaintiff's online blog speech owed its existence to FAU when Plaintiff utilized a disclaimer stating his speech had no connection to FAU, all at FAU's insistence.

Moreover, the "mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee speech." Lane versus Franks, 134 Supreme Court 2369, at 2379, 2014.

Finally, the fact that speech that owes its existence to public employment is not protected speech is a doctrine that

must be read narrowly to encompass speech that an employee made to further his employment, and not merely be speech that concerns the ordinary responsibilities of employment. Alves versus Board of Regents, 804 F.3d 1149, at 1162, Eleventh Circuit, 2015. FAU even publicly distanced itself from Plaintiff's speech. In conclusion, the Court concludes that Plaintiff's speech in this case was speech that he authored as a private citizen.

The Court turns to the second step of the inquiry, whether the Plaintiff spoke on a matter of public concern. This step focuses on whether Plaintiff spoke on matters of public interest or on matters of personal interest. Boyce v. Andrew, 510 F.3d 1333, 1342 to 43, Eleventh Circuit, 2007. To fall within the realm of public concern, an employee's speech must relate to "any matter of political, social, or other concern to the community." Connick v. Myers, 416 U.S. 138, 146, 1983.

Again, the Court fails to see how FAU even could make an argument disputing this point. Plaintiff did not blog about private matters. Plaintiff did not author speech concerning private matters or internal affairs at FAU. Plaintiff authored speech that focused on national events, which garnered national attention, and focused on his views on gun control and conspiracies entered into by the United States Government. Matters that fall within the ambit of public concern are

matters that are the subject of legitimate news interests, and Plaintiff's speech certainly attracted news interest in this case. Snyder v. Phelps, 562 U.S. 443, at 453, 2001.

It is not for this Court to pass judgment on Plaintiff's views. This Court must only decide whether the views concerned private matters or public matters. The Court concludes that the Plaintiff's speech concerned public matters.

The Court must conduct an analysis under Pickering v. Board of Education, 391 U.S. 563, 1968. Pursuant to Pickering, the interests of a Governmental employee must be balanced with the interests the state employer had in promoting the efficiency of the public services which it performs through its employees. The "manner, time, and place of the employee's expression" and the "context in which the dispute arose" are relevant to the Pickering balance. Rankin versus McPherson, 483 U.S. 378, 1987.

Also relevant is whether speech impairs discipline by superiors, harmony among co-workers, or otherwise impedes the performance of the speaker's duties and the operation of the employer's enterprise. Also citing to Rankin.

Here, the Court fails to see how the Pickering balancing test could weigh in favor of FAU. FAU has not advanced the position that Plaintiff's free speech impacted Plaintiff's ability to teach, and FAU therefore needed to limit his speech. Plaintiff's performance reviews were excellent.

Similarly, FAU has not presented cogent evidence that Plaintiff's speech had a tangible, measurable impact on FAU's ability to provide services to the public. Instead, FAU has advanced the opposite position by repeatedly contending at trial that Plaintiff was not inhibited from his speech in any way, that Plaintiff was told he was free to continue his speech. Plaintiff was not informed by FAU that his speech was impacting FAU's ability to provide services.

Similarly, FAU's evidence that Plaintiff's speech impacted FAU operations or internal working relationships relied primarily upon evidence of angry emails, phone calls, and the like.

FAU argues a Pickering balancing test should weigh in its favor, citing to many complaints from the public over Plaintiff's speech, a single student withdrawing from classes, and a single donor withdrawing funds from FAU. The Court rejects this argument. FAU did not introduce evidence of the additional cost, such as overtime, that public complaints had upon university operations. There were no riots at FAU, no evidence of protests causally connected to the Plaintiff's speech or disruptions to the actual services offered by FAU.

The Court rejects the notion that FAU's evidence of safety concerns precludes Plaintiff's First Amendment protections. For example, while Dr. Coltman testified that she wanted a police presence on campus after Plaintiff's blog

postings, there was also evidence at trial of other events on campus that warranted and required a police presence completely unrelated to Plaintiff during the same period of time.

What the Court has is evidence of many complaints from the public, which is to be expected with unpopular speech in an age when information can be rapidly disseminated to the entire world through the internet. The First Amendment does not permit a "heckler's veto," wherein the public "shouts down unpopular ideas that stir anger." Melzer v. Board of education, 336 F.3d 185 at 199, Second Circuit, 2003.

A community's reaction cannot dictate whether an employee's constitutional rights are protected. This is not a case where the speech at issue carried with it "explosive racial situations in a city already marked by poor relations between a sizable black minority and the city's most important law enforcement agency". See McMullen versus Carson, 754 F.2d 936, Eleventh Circuit, 1985, balancing Pickering in favor of a law enforcement agency when the employee was an active recruiter for the Klu Klux Klan.

FAU also raises an argument that its reputation was so damaged by virtue of Plaintiff's exercise of speech that the Plaintiff's First Amendment protections should be denied on that basis. This was not a trial about the damage to FAU's reputation.

FAU did not raise this as an affirmative defense. The

Court has not heard cogent, focused testimony on how Plaintiff's speech impacted FAU's enrollment, FAU's standing in the academic community, or any similar contention. FAU has instead consistently maintained that Plaintiff's speech had no impact on its decision to terminate him, and the impact of Plaintiff's speech on FAU was only a tangential issue at trial. Nor has FAU advanced the position at trial that it would have been justified in terminating the Plaintiff on alternative grounds because of the sheer impact that his speech had on the university. The Court rejects FAU's arguments on this point.

Evidence at trial on tangible, material impacts on FAU services due to Plaintiff's speech was tangential and not enough to preclude Plaintiff from his First Amendment protections under Pickering. For all of the foregoing reasons, the Court concludes that the Pickering balancing test weighs in favor of Plaintiff. Defendant's motion for Judgment as a Matter of Law is denied as to this issue, and Plaintiff's motion for Judgment as a Matter of Law is granted as to this issue, and Plaintiff's Count 1 may be submitted to the jury.

On the jury instructions, if I could just provide you with the last two versions of the jury instructions. Court Exhibit 5 will be a redline version. Court Exhibit 6 is the clean version.

I will make two rulings that I think will address the larger issues that were addressed, and then you will see that

the red line is very de minimus at this point in light of the Court's rulings and all of the arguments we have had.

The Court is going to exclude Defendant's proposed special instruction regarding decision makers. The Defendant pointed to Kamesky v. Dean, 148 F.Appx. 878, Eleventh Circuit, 2005, for the proposition that "in the termination context, a decision maker has the power to terminate an employee, not merely the power to recommend termination." That is 879-80. Kamesky, however, is distinguishable from the instant case because it dealt with individual liability. Similarly, Defendant's reliance on the pattern instruction's annotations and comments on "individual liability" is not persuasive because this case is not about individual liability.

Although the Court understands the Defendant's concern about argument regarding individuals who did not have decision-making authority, Plaintiff has proffered that it is going to argue that only Alperin and Coltman were involved in the decision to fire Professor Tracy. As long as the argument regarding the decision to terminate Tracy is limited to these two individuals and is based on the evidence admitted during trial, the Court believes that the special instruction regarding decision makers is unnecessary.

The rest of the proposed instruction, instructing the jury to not second-guess the wisdom of FAU's business decision if the jury finds it was nondiscriminatory, is redundant

because it is covered by the pattern instruction.

With respect to the waiver that has to do with the affirmative defense that the Defendant was asking for an instruction on, Defendant acknowledges that it has no case law for its proposed instruction and premises the instruction on the general proposition that any constitutional right can be waived.

The Court notes that neither the Defendant's proposed instruction nor its sixth affirmative defense say anything about waiver. Nor does Defendant set forth the legal elements of waiver of a constitutional right, which must be "a voluntary, knowing, and intelligent act done with sufficient awareness of the relevant circumstances and likely consequences."

Montas v. United States, 2017 WL 3835957, Southern District of Florida, 2017, citing Brady versus United States, 397 U.S. 742, at 748, 1970.

What I am going to give the Defendant's counsel an opportunity to do, and to submit by the end of the day, is to, if he wants to, is to address why it did not include the elements of waiver in its instruction or provide the Court with any interrogatory on this defense in its proposed jury verdict form, and why the word "waiver" does not even appear in the proffered instruction, which Defense says is based upon the doctrine of waiver.

I also need an explanation of what evidence the Defendant would rely on to establish the defense and, assuming the conduct you are relying on is insubordination, how this conduct results in a waiver of the Plaintiff's First Amendment rights rather than providing an independent, nonconstitutional ground for termination.

What I am struggling with is that the Defendant's defense has been entirely based on the proposition that Plaintiff is insubordinate, but insubordination merely provides a nonconstitutional basis to terminate Plaintiff. In other words, if he is insubordinate, he can be terminated because the termination has nothing to do with his constitutional rights. The Court doesn't quite understand how he can waive his constitutional rights through an action, not a written waiver, when that action merely provides, as a matter of law, that he can be terminated for nonconstitutional reasons.

At this point, in terms of going over the jury instructions, the waiver of affirmative defense is not to be included in the packet; however, I will give the defense an opportunity, if it chooses to avail itself of that, by five o'clock today to submit something to the Court that addresses these questions that the Court has and what the Court has just stated on the record. And if the Plaintiff files anything by five o'clock today, then I will allow Defense, by five o'clock on Saturday to file a response.

This way, I will review it, and if there are any changes to the instructions based on what I have reviewed, I will entertain it, and that can be added to the instructions.

I would include with the requirement by five o'clock today, if Defendant chooses to avail itself of that, that you include a proposed jury -- what the proposed jury instruction looks like. If it is the one you have been traveling on all along, and the revisions we have been going through, attach that to your briefing, or if it is something different, attach it to your briefing. If you are proposing a revised version of the verdict form, attach that as well, so I have the proposed instruction and proposed verdict form revision and then the briefing that addresses my questions. And then, by five o'clock on Saturday the Defendant can respond.

And so, if that needs to be taken up first thing Monday morning, we will do so. We will all convene by 8:30, I have the jury coming back at 9:00.

Who is going to take the lead on the compilation of the jury instructions? Is it going to be the Plaintiff? The Court is not going to make all the copies. Often times it is the Plaintiff who does that.

MR. BLICKENSDERFER: I don't mind, your Honor.

THE COURT: We will talk about logistics. Eight jurors, a set for yourself would be nine, for Defense, ten, Pauline, 11, me, 12.

So, I would say to be on the safe side come in with 14 sets, clip them, not staple them, in the event something changes like the issue of waiver or anything else that comes up. Nothing else should come up, we are having our fourth conference on the instructions, but it is much easier to have them clipped, not stapled, and you don't have page numbers on them. Everything else is pretty much perfect.

Come in with all of the set on Monday of Court Exhibit 5. I will not go through the pages no one has had objections to thus far. If you want to flip through until we get to the first page that has a redline on it and I -- you know, expert witness is still in. That should not be in. I just noticed that. Let me see.

We can email this if this is helpful to the Plaintiff, this last version, since you are going to be compiling it.

MR. BLICKENSDERFER: That would be great.

THE COURT: We will do it to the Plaintiff and Defense, we'll email the clean version. We made an error, we did not remove expert witness. Expert witness should come out from the redline version. It doesn't show that it is, but it should.

Everything else has been agreed to or the Court has already made a ruling on.

The very next place where there is a red line is -- it is hard because there aren't many left -- is the page that --

the instruction with public employee, First Amendment claim, the second page.

I have taken out the word protected where the pattern called for protected, you may recall there are three different places in the pattern, and refers to it just as speech or a bracket that says describe screech. Where it says speech, I always go with speech, and put in a description. I have gone with what we decided. Blog speech, protected speech, I am taking that out. I believe that can be confusing in light of the fact that both sides agreed that the one paragraph that talked about protected speech, both sides wanted it out.

Any time the pattern referred to protected speech, I put speech. I don't think it causes confusion, I think it avoids confusion, and I think we have addressed the important issue that is sort of wrapped up in the issue of protected speech based on the one statement that the Court has made about the Court finding that this is a matter of public concern.

I am not seeing exactly where that is. I believe all the rulings the Court has made makes it clear to the jury and not adding protected speech, particularly since we have taken out the paragraph in the pattern that refers to protected speech by agreement of both sides.

I don't think it is necessary, I don't think it is prejudicial, and in fact I think it could possibly be confusing in light of removing that one paragraph.

Those are the red line versions you see on that page, it does not have the word "protected".

Again, in the pattern it would have had protected, and I am simply taking that out and it is being referred to as speech. That is in two instances -- four different instances on that particular page.

And then the next -- if you turn to the very next page, you will see similarly in the first paragraph, third line from -- the third line of the paragraph, protected was taken out, the next paragraph, blog and protected was taken out again to be consistent with the pattern insofar as the pattern doesn't call for the descriptive of the speech there and the Court ruled it is not going to use the word protected.

Go a few lines down, blog is taken out because the description of the speech was not part of the pattern, and the same type of change is made to the very next page. And otherwise, there are no other changes that have been made.

So, what I will do is email to both sides Court Exhibit 6, which is a clean version of that with the expert witness being taken out, and I guess I would ask at this time are there any objections that are not already a matter of record from the Plaintiff?

MR. BLICKENSDERFER: Just to be clear, our record was currently the instruction says the Court has already found that Professor Tracy's speech was a matter of public concern.

Without protected speech, the jury does not know what public concern is.

The Court doesn't have to repeat protected speech if it feels that is not necessary and confusing because some parts use protected, some don't. Just leaving it, it is a matter of public concern, okay, that seems like kind of, without that extra part that this is protected, that means nothing.

THE COURT: You are talking about the page public employee, First Amendment claim where it says -- which page is on that on?

MR. BLICKENSDERFER: The first full page of 4.1, the last sentence.

THE COURT: The Court has found that Professor Tracy's blog speech was a matter of public concern.

That is your concern. You think that doesn't mean anything to the jury so you would persist or reraise your previous request that the language is -- what was the language you used?

MR. BLICKENSDERFER: And thus is protected speech.

THE COURT: Anything else from the Plaintiff not a matter of record?

MR. BLICKENSDERFER: No, your Honor.

THE COURT: From the Defense, in response to that comment and anything else that is not a matter of record?

MS. HUFF: Your Honor, in response to that comment, we

believe the way it reads now is consistent with the standard, and there shouldn't be a deviation from the standard on this point and it would be redundant. In the previous line it talks about exercise First Amendment rights, and it is redundant to add and therefore protected speech, that is implied.

It would be prejudicial to emphasize their theory of the case over the Defendant's.

THE COURT: Any other objections that are not a matter of record?

MR. CURLEY: No new objections, they are all preserved, your Honor.

THE COURT: What I will do is email to both sides a clean version and we'll definitely have the expert witness out and I'll take a look at what is going to be raised again as to that protected activity, having heard on both sides. It will be in or it won't, and that will be the final version with the Court having made all of its rulings, and the only other issue for the Court -- and, so, what is going to be emailed to Plaintiff's counsel and bring in the 14 copies -- I would say you don't need 14 copies of the verdict form. I will only give one copy of the verdict form and that is the one they get when they go back to deliberate.

Bring in a handful, one for yourself, Defense, and one for Pauline and myself, and that will be fine. And again, by five o'clock today if Defendant wants to be heard on the issue

of waiver, file something and Plaintiff will respond by 5:00 on Saturday. And then with that, you will have your proposed instruction and proposed verdict form revision, if you are making any, and we will all meet at 8:30, so if there is any last minute addition, the Court will entertain it.

It can fairly readily be inserted because there won't be page numbers and there is a clip on the instructions.

Does that cover everything from the Plaintiff?

MR. BLICKENSDERFER: Yes, your Honor.

THE COURT: From the Defense?

MR. CURLEY: From the Defense, two things. I expect we will start closing arguments at nine o'clock sharp.

THE COURT: Don't you want me to read the jury instructions first?

MR. CURLEY: Of course.

THE COURT: Nine o'clock sharp I read the jury instructions and turn it over to Plaintiff for closing, and then Defense. Are you still adhering to one hour for Plaintiff and 45 to 60 for the Defendants?

MR. LEO: Yes. The Plaintiff will reserve 20 minutes of that time.

THE COURT: 40 and 20. Do you want a notice before the 40 and 20 are up?

MR. LEO: Five minute warning.

THE COURT: On the both of those?

MR. CURLEY: Yes.

THE COURT: What kind of notice does Defense want?

MR. CURLEY: Defense won't require notice.

THE COURT: And you heard I am ordering lunch for them, they will be able to eat lunch. There is a lot of work looking at the exhibits. I guess the first question is, did anyone note that there was anything in error in the way the Court has tracked the Plaintiff's and Defendant's exhibits? Do they match? I know you have copies of them. Do they match Plaintiff's version?

MR. MEDGEBOW: Yes, with two discrepancies. The Court failed to identify 44 and 59 are ID only.

THE COURT: Hold on. We are on Plaintiff's, and Exhibit 44, which I have nothing marked, I should have it marked for ID?

MR. MEDGEBOW: Yes.

THE COURT: What date was that?

MR. MEDGEBOW: I believe it was yesterday -- not yesterday. I believe it was Wednesday, your Honor.

THE COURT: Does the Defendant agree that 44 is marked?

MR. CURLEY: I don't remember it being marked, that is okay.

MR. MEDGEBOW: I conferred --

THE COURT: I am marking 44 for ID.

MR. LERMAN: Thursday, at the end of the day when Dr. Coltman was testifying, the 6th, your Honor.

THE COURT: I will put 12/6 for that. What else?

MR. MEDGEBOW: Same thing for 59, ID only, it was the same -- let me double check to see the date. Same date as well.

THE COURT: Defendant agrees Plaintiff's 59 on 12/6, should be marked for ID?

MR. FEICHT: ID only.

THE COURT: How about Defendant's exhibit list?

MR. MEDGEBOW: One more. The Court had noted that Plaintiff's 95 was marked for ID only.

THE COURT: Just a minute. Well, there is 95, I do have that as marked for ID only.

MR. MEDGEBOW: 95 was not marked for ID. It was 95-A and B, so it is 95-A and B as the Court noted as well.

THE COURT: Nothing should happen to 95. It should be crossed out?

MR. MEDGEBOW: Yes.

THE COURT: I have 95, 95-A, B, C.

MR. MEDGEBOW: That is correct. 36, it is in evidence, we did in the courtroom a redaction. I will be making an official redacted one Monday morning, and I will show it to the Defense.

THE COURT: Plaintiff's 36 is redacted?

MR. MEDGEBOW: It is redacted, I am going to bring a better version so the jury cannot see the writing.

THE COURT: Yes, on anything and everything redacted, obviously, you all have to get together and make sure it satisfies both of you.

So, on Defendant's exhibit list, any discrepancy?

MR. FEICHT: A question, not a discrepancy. Defendant's 225 was entered into evidence, that was the podcast recording with redactions. We wanted to make sure the jury had that evidence to listen to if they chose. We wanted to know the Court's preference, if you wanted it on a CD, thumb drive, how we can get it so the jury can listen to 225 in evidence.

THE COURT: Exhibit 225 was in, admitted on --

THE CLERK: We had a trial where something went back to the jury, the attorneys brought in a clean laptop and a CD with it on it. That is how it was handled and it seemed to go well.

THE COURT: I don't know what that means. How long was it again? Remind me. Worst case scenario, I don't want it to keep people up all hours of the night, we can bring them in and have it played in the courtroom. If it causes anybody unreasonable angst, I don't see why we can't bring them into the courtroom and play it.

MR. FEICHT: 225-A was our office's unofficial transcript, it was used outside the presence of the jury to

assist with argument. We didn't know the Court's preference as far as do we need to put that in the marked for identification purpose pile; and if so, should we redact the portions that show it was a Gunster memo prepared --

THE COURT: Maybe redact everything other than what was read, be consistent with what was read.

Have an ID pile, Plaintiff's pile, Defense pile so you can use it readily. Has everyone checked, are all exhibits there?

MR. MEDGEBOW: Yes.

THE COURT: Plaintiff and Defense?

MR. MEDGEBOW: I only checked Plaintiff's.

THE COURT: You can represent that all Plaintiff's exhibits admitted into evidence are in one pile and everything marked for ID is in a marked pile. Defense as well?

MR. FEICHT: Yes.

THE COURT: Make sure redactions are done properly to everyone's satisfaction. If you are going to use them during closing, that is fine, just put them back. And I will allow you to go through them so you can say on the record they are all there before they are brought back to the jury.

MR. MEDGEBOW: We have no objection if the Defendant wants to bring in a CD player.

THE COURT: Okay.

MR. FEICHT: We will see whatever option is easier, we

will try to find a Walkman perhaps. One other thing not in the marked -- in the ID file, Nobody Died at Sandy Hook, we will make sure that is there.

MS. HUFF: Your Honor, if any changes are made to the jury instructions, we would like to confirm we will have an opportunity to be heard on that.

THE COURT: Yes. As of right now, they are what they are, and the Court made all of its rulings. What I will give one last thought to is that matter of public concern and protected activity, so you will either see it in or out in the one place. Protected will not be anywhere else. Expert is coming out. As of right now, all objections are a matter of record and that reflects the Court's ruling.

MR. CURLEY: Notwithstanding that, we would like to be heard if the Court tinkers with the instructions any more.

THE COURT: I am not going to. They are what they are right now.

The only thing I will entertain is what you provide, if you provide anything, with respect to waiver. We will get here at 8:30 and I will let you be heard on that, although I suspect your briefing will be sufficient for the Court to understand your point. So, the Court will make a ruling. If the Court has a question, it will ask a question, otherwise everything is ruled on. I am not tinkering any more with anything.

MR. BLICKENSDERFER: Would you like my email?

THE COURT: Yes. We have it. Have a great weekend.

(Thereupon, the hearing was concluded.)

* * *

I certify that the foregoing is a correct transcript from the record of proceedings in the above matter.

Date: January 2, 1018

/s/ Pauline A. Stipes, Official Federal Reporter

Signature of Court Reporter

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